APPENDIX

OPINION OF THE SUPREME COURT OF IDAHO.

William Kinzell, respondent v. Chicago, Milwaukee & St. Paul Railway Company, a corporation, appellant. Boise January Term, 1918. Filed Mar. 26, 1918. I. W. Hart, Clerk. Master & Servant—Interstate Commerce—Federal Employers' Liability Act.

1. A laborer employed in the construction of a fill beneath a wooden trestle, which when completed was intended to take the place of the trestle and to support the track of a railroad company engaged in the transportation of both intrastate and interstate commerce, is not engaged in interstate commerce so as to entitle him to maintain an action for personal injuries under the Federal Employers' Liability Act of April 22, 1908, chap. 149, 35 Stats. at L. 65.

Appeal from the District Court of the First Judicial District for Shoshone County. Hon. William W. Woods, Judge.

Action for damages for personal injuries. Judgment for plaintiff. *Reversed.*

Robert H. Elder for appellant.

John P. Gray, W. D. Keeton, W. F. McNaughton and Jas A. Wayne for respondent.

RICE, J.

William Kinzell brought this action to recover damages for personal injuries received by him while in the employ of a railroad company engaged in both intrastate and interstate commerce. The injuries complained of were received in the State of Washington while appellant was engaged in constructing a dirt fill beneath a wooden trestle, known as Bridge No. 140 near the town of Ewan, Wash., which fill was intended eventually to support the track. The material with which the fill was being constructed was obtained from new construction work entirely within the State of Washington, and no question of interstate commerce was thereby involved. The fill had progressed to the extent that it had in places reached the railroad ties and it had become necessary, after dumping the cars of dirt, to use what is known as a "bulldozer" to spread the dirt away from the track and thereby widen the fill. The bulldozer employed in this case was a flat car

with adjustible wings extending on either side from a point slightly over each rail and spreading out toward the back of the car.

The principal duty of respondent was to adjust these wings, and at times when they were waiting for another train load of dirt, he and Hyram Lee, another employe upon the dozer, used shovels to clean out the rocks that lodged between the tracks. The dirt was being brought to the fill by means of two trains of about twenty-five "air dump" cars each. When the train approached the bridge, it would couple onto the dozer and proceed to the place where the dirt was to be dumped. After dumping the dirt the cars would be righted, and the train would start back, pulling the dozer after it. The wings of the dozer would level down the dirt dumped, spreading it away from the track and thus widen the fill.

At the time of his injury, respondent was standing on the front of the dozer waiting for the dirt train to couple on. While he was waiting he was looking over the fill to determine where this train load of dirt should be dumped. He contends that through negligence of the appellant, the train was going at so great a rate of speed when it coupled onto the dozer that it broke his hold on the cross rods

and crank shaft and threw him violently to the ground between the wheels of the head car and injured him severely.

Before the trial of this case appellant moved to have the respondent make an election of remedies, and respondent elected to bring his case under the Federal Employers' Liability Act, 35 Stats. at L., chap. 149, p. 65, the material part of which is as follows:

> "That every common carrier by railroad while engaging in commerce between any of the general states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs or other equipment."

While a number of errors are assigned which appear to be worthy of careful consideration, the question which will dispose of the case, according to the conclusion we have reached, is whether respondent was within the terms of the act at the time the injury occurred. The other matters presented will not, therefore, be discussed in this opinion.

Respondent suggests that the act is remedial in its character and should be so construed as to prevent the mischief and advance the remedy—Citing, St. Louis, etc. R. Co. v. Conley, 187 Fed. 949; Bolch .v C. M. & St. P. R. Co., 155 Pac. (Wash.) 422. The construction of the act, however, does not admit of any discretion on the part of the court, nor are the rules of strict or liberal construction applicable.

The sole question presented by this feature of the case is whether respondent was engaged in interstate commerce at the time the accident occurred, and therefore has a cause of action arising under the federal statute, or whether he must seek his remedy under the Workmen's Compensation Act of the State of Washington. Raymond v. C. M. & St. P. R. Co., 243 U. S. 43, 61 L. Ed. 583.

Many cases have arisen in which the courts have been called upon to lay down rules by which this question shall be determined. It is held that the employe must at the time of his injury be employed in interstate commerce. Ill. Cent. R. Co. v. Behrens,, 233 U. S. 473, 58 L. Ed. 1051; Shanks v. D. L. & W. R. Co., 239 U. S. 556, 60 L. Ed. 436.

In the last cited case it is said:

> "Having in mind the nature and usual course of the business to which the act relates, and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (See Swift & Co. v. U. S., 196 U. S. 375, 398; 49 L. Ed. 518, 525; 25 Sup. Ct. Rep. 276), and that the true test of employment in such commerce in the sense intended, is, was the employe at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

Applying the test, it is held that one engaged in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation, is engaged in interstate commerce. Pedersen v. D. L. & W. R. Co., 229 U. S. 146 57 L. Ed. 1125; San Pedro etc. R. Co. v. Davide, 210 Fed. 870; Phila. etc. R. Co. v. McConnell, 228 Fed. 263; Southern Ry. Co. v. McGuin, 240 Fed. 649; Cincinati Ry Co. v. Hall, 243 Fed. 76.

So, also, one engaged in an act incidental to his employment in interstate transportation comes within the provisions of the act. Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. Ed. 1057; Louisville, etc. R. Co. v. Parker, 242 U. S. 13, 61 L. Ed. 119; N. Y. C. R. Co. v. Carr, 238 U. S. 260, 59 L. Ed. 1298; Lamphere v. O. R. & N. Co., 196 Fed. 336.

But one engaged in an employment upon an article which may ultimately become an element of interstate commerce, but which is too remote to be directly connected therewith, or incidental thereto, is not engaged in interstate commerce within the meaning of the act. D. L. & W. R. Co. v. Yurkonis, 238 U. S. 439 59 L. Ed. 1397; C. B. & Q. R. Co. v. Harrington, 241 U S. 177, 60 L. Ed. 941; Leheigh, etc. R. Co. v. Barlow, 244 U. S. 183, 61 L. Ed. 1070; Shanks v. D. L. & W. R. Co., supra; Minn. & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. Ed. 358 N. Y. C. R. Co. v. Carr, supra.

It is well settled that new construction of either roadbed or equipment, designed ultimately to be used in interstate commerce, is not, while in the process of building, an instrument of interstate commerce, and one injured while employed about the same is not within the terms of the act. Raymond v. C. M. & St. P. R. Co., supra; Bravis v. C. M. & St. P. R. Co., 217 Fed. 234; Minn. & St. L. R. Co. v. Nash, 242 U. S 619, 61 L. Ed. 531; N. Y. C. R. Co. v. White, 243 U. S. 188, 61 L. Ed. 667; C. & E. R. Co. v. Steele, 108 N. E. (Ind.) 4; McKee v. Ohio etc. R. Co., 88 S. E. (W. Va.) 616.

In the case of Louisville etc. R. Co. v. Parker, supra, it is said:

> "The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate," N. Y. C. R. Co. v. Carr, supra.

We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become a part of the railroad until it is completed and the track is placed upon it instead of upon the trestle. U. S. v. C. M. & P. S. R. Co., 219 Fed. 632; Dickinson v. Industrial Board of Illinois, 117 N. E. (Ill.) 438. Columbia P. R. Co. v. Sauter, 223 Fed. 604, is not to the contrary, for in that case the main purpose of the work was directly connected with the transportation of interstate commerce.

It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case. But if it were true, it is but an incident to the work of making the fill and not a purpose in view

in its construction. It is true one of the duties of respondent was to remove dirt and rocks from the track, which lodged thereon when the cars were dumped and which might, if allowed to accumulate, interfere with interstate commerce. This, however, was but an incident to the work of constructing the fill and did not change the character of the employment. The object of the work, as pointed out in the Parker case, is controlling.

It follows that respondent does not come within the provisions of the Federal statute, and that the action cannot be maintained. The judgment is reversed, with instructions to dismiss the action. Costs awarded to appellant.

Budge, C. J., and Morgan, J., concur.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Little need be added to the statement in the petition concerning the facts. Some slight amplification, however, may be of assistance.

The bridge upon which the petitioner was employed was one of several which had been constructed in 1908, and which were being filled at or about the time of the injury complained of.

Kinzell testified that the road master of the respondent company, McGee, told him that the bridge upon which he was working had to be filled. (Record pp. 87-8)

The respondent railroad company called J. F. Pinson, an assistant engineer in charge of bridges and building. He testified on direct examination that he had made an inspection of the bridge which Kinzell was filing; he knew its life and capacity, and that from his inspection and his knowledge the life of the bridge was at least two years from the date of inspection; that the bridges had been built in 1908; that the fills were being made for the purpose of replacing the bridges. ((Record pp. 193-4) On cross examination he testified as follows:

Q. When did you make that inspection?

A. In April 1914.

Q. You said the bridge then had two years of life?

A. At least two years.

Q. You mean by that after that time you would have to fill in there or build a new bridge, is that the idea?

A. Probably at that time.

The filling was being done and the injury to the petitioner was received in February 1915, approximately one year short of the engineer's estimated life of the bridge.

The superintendent of the respondent railway company, A. E. Campbell, testified that at the time Kinzell was hurt he had charge of the work and that they were making an embankment under the bridges which would eventually replace them, the material being taken from certain line changes and grade reductions along the road. (Record, p. 189) He further testified that on the day the petitioner was injured the fill was not completed but that the rails and ties were resting on the bridge itself and not on the embankment. (Record, p. 190)

On cross examination he testified that the purpose of the work being done was two-fold; the improvement of the track, grade, etc., and at the same time the filling of the wooden bridges further west, and that during the time they were working on these bridges, filling them, interstate trains passed to and fro over the track and over the bridges; that at the time of the accident the bridge upon which the petitioner was working had been filled right up into the ties; that the "dozer" is not used until the material comes up level with the ties; that the "dozer" did not clear up the material which was dumped and which lodged between the rails; that it worked only outside of the rails; and that it was a part of Kinzell's duty to take a shovel and clear away the rocks and material which lodged between the rails; that the reason the rocks and material were required to be moved from between the rails was to make it safe for the operation of trains so that there would not be any delay through accidents occurring. (Record, pp. 191-3)

The facts, therefore, are that the fill was being made to replace a bridge on the interstate track of the defendant which had performed its duty and which, in the interest of safe operation, required replacement within a short time.

The trial court was of the opinion that the petitioner was engaged in interstate commerce within the meaning of that term as used in the Federal Employer's Liability Act and submitted the case to the jury. The jury found the railway company guilty of negligence, by answers to special interrogatories found petitioner to be free from contributory negligence, and returned a verdict in his favor.

The trial court's instruction to the jury upon the question of the plaintiff being engaged in interstate commerce is Instruction No. 14. (Record, pp. 31-2).

The Supreme Court of Idaho in its opinion discusses no question except the one as to whether or not the petitioner was employed in interstate commerce at the time of his injury within the meaning of that term as used in the Federal Employer's Liability Act. After citing *Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, the court says: (Omitting citations)

> "Applying the test, it is held that one engaged in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation is engaged in interstate commerce * * * *

But one engaged in an employment upon an article which may ultimately become an element of interstate commerce, but which is too remote to be directly connected therewith, or incidental thereto, is not engaged in interstate commerce within the meaning of the act. * * *

It is well settled that new construction of either roadbed or equipment, designed ultimately to be used in interstate commerce, is not, while in the process of building, an instrument of interstate commerce, and one injured while employed about the same is not within the terms of the act * * * *

We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become part of the railroad until it is completed and the track is placed upon it instead of upon the strestle. * * *

It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case. But if it were true, it is but an incident to the work of making the fill, and not a purpose in view in its construction. It is true one of the duties of the respondent was to remove dirt and rocks from the track, which lodged thereon when the cars were dumped, and which might, if allowed to accumulate, interfere with the interstate commerce. This however, was but an incident to the work of constructing the fill, and did not change the character of the employment. The object of the work, as pointed out in the Parker case, is controlling.

> It follows that respondent does not come within the provisions of the federal statute, and that the action cannot be maintained."

The question is, therefore, clearly presented: Was the petitioner, at the time of the injury, so employed as to come within the terms of the Federal Employers' Liability Act?

The principles governing this case are well understood and the decisions of this court need not be extensively referred to. We may be permitted, however, to quote from

Pedersen v. D. L. & W. R. Co., 229 U. S. 146

where this court says:

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * * Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.
>
> True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.

> The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as in the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

This case is not one wherein it is sought to extend the doctrine of the Pedersen case, but is one in which a strict application of the conclusions in that case is determinative in the petitioner's favor.

The trestle or bridge which was being filled and the track which was being kept clear for the passage of interstate trains had long been used in interstate commerce. The work was not the construction of a new piece of line which had never become an instrumentality used in interstate commerce. According to the railroad company's own showing, the time was approaching when the bridge must, in order for the railroad company to carry on its interstate business, be either filled or replaced by a new bridge. Had the railroad company delayed until the bridge was no longer capable of supporting the

interstate trains passing along the line, the construction of a new bridge in its place would have been directly connected with the transportation of interstate commerce.

Columbia & P. S. R. Co. v. Sauter, 223 Fed. 604 (C. C. A. 9th Circuit)

The Supreme Court of Idaho in its opinion concedes that such is the effect of the above decision and does not disagree therewith. In that case bridges maintained by two railroads over a certain stream had been destroyed by freshets and the two companies had joined in the construction of a trestle for the purpose of expediting travel, one company building from one side of the river and the other company building from the other side. An employe was killed during the work. His administrator prosecuted the action. The deceased was engaged at the time of his death in clearing a space in which piles could be driven, not to support the old bridge, but to support the new trestle that was being constructed. The precise question was whether or not deceased was engaged in interstate commerce at the time he was killed. The court applied the tests announced in the Pedersen case and held that the work was not being done independently of the defendant's interstate commerce, and was not a matter of indif-

ference to such commerce, but was so closely connected therewith as to be a part of such commerce.

It will doubtless be urged by respondent's counsel that the work in the Sauter case was in repairing the old bridge, which had been destroyed by the freshet; but reference to page 607 of the 223rd Federal Reporter will disclose the fact that it was agreed by counsel that:

> "The deceased was engaged in making clear a space in which piles could be driven, not to support the old bridge, but to support the new trestle."

a work which was distinctly new, but which was so intimately connected with the movement of interstate commerce as to be for all practical purposes a part of such commerce.

Is the replacement, if it precede the actual falling in of the old bridge, different in character from the replacement if the railroad company is dilatory in its duty and waits until the bridge is no longer capable of supporting traffic before it replaces it? In principle, there can be no distinction.

Following the decision in the Pedersen case, it was attempted to extend the terms of the act to include practically all employes engaged in railroad

work, however remote it might be to interstate commerce. The act was held not to cover employment in a tunnel which was only partially bored, since it was not in use and never had been in use as an instrumentality for interstate commerce.

Raymond v. C. M. & St. P. R. Co., 243 U. S. 43

An employe of a railroad company, injured while mining coal in a colliery operated by the railroad company, was not within the act, even though the coal ultimately was intended by the railroad company for use in interstate commerce.

Delaware L. & W. R. Co. v. Yurkonis, 238 U. S. 439

An employe in a machine shop operated by a railroad company for repairing parts of locomotives used both in interstate and intrastate transportation was not within the act while engaged in taking down and putting into a new location in such shop an overhead countershaft through which the power was communicated to some of the machinery used in the repair work.

Shanks v. D. L. & W. R. Co. 239 U. S. 556.

Under the admitted facts, the railroad company was, in filling that trestle, engaged in maintaining its interstate road at that point in proper condition

after it had become an instrumentality of interstate commerce and during its use as such.

The Supreme Court of Idaho in this case conceives that the case comes within the rule of new construction work as in the case of

Raymond v. C. M. & St. P. Ry. Co., 243 U. S. 43

The court holds that filling a trestle which is being used in interstate commerce is new construction and the fill does not become part of the railroad until it is completed and the track is placed upon it instead of upon the trestle. The conclusion is supported by two citations of authority, to which we will refer hereafter.

The conclusion, however, is in direct conflict with the language of this court in the Pedersen case where it is said:

> "Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * * Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. * * *

The point is made that the plaintiff was not, at the time of his injury, engaged in re-

moving the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this."

Suppose that the progress of the work on that trestle had extended to the point where the petitioner, Kinzell, was taking up a rail of the track to replace it upon the fill instead of upon the bridge. Would he not at that moment have been engaged in work which would bring him within the statute? Suppose he were removing the old ties from the trestle and replacing them upon the fill. Under the authority of the Pedersen case, would he not have been engaged in interstate commerce? The answers obviously must be that he would have been. So it was necessary preliminary to the relaying of the track, to the entire replacement of the bridge, that this other work should be done, and it was as essential thereto as it was that Pedersen should carry bolts for use in the replacement of an old girder in a bridge.

But the Supreme Court of Idaho holds that the replacement of the track even would not have been an employment within the act and that the fill would not become a part of the railroad until it had been completed and the track placed upon it. In sup-

port of its final conclusion that the petitioner was not engaged in interstate commerce at the time of his injury, the Supreme Court of Idaho cites *United States v. C. M. & P. S. Ry. Co.,* 219 Fed. 632, a district court decision, and *Dickinson v. Industrial Board of Illinois,* 280 Ill. 342.

The first case cited was an action by the United States against the railroad company for violation of the Hours of Service law (Act March 4, 1907, 34 Stat. at L. 1415, Ch. 2939). The case was submitted upon the pleadings and a stipulation. An engineer, who had previously been engaged in interstate commerce, was assigned to duty on an engine hauling a work train engaged in filling a bridge on defendant's interstate line, and he was so wholly engaged in such service for fifty-nine days, during which time he was permitted to remain on duty continuously for more than sixteen hours. The court held that the railroad company was not thereby guilty of violating the Hours of Service law, though the engineer was subject to recall for interstate service during such period and at the end thereof was reassigned to interstate commerce. The Hours of Service law provides:

> "The provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transpor-

tation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad. whether owned or operated under a contract, agreement, or lease; and the term 'employe' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train."

The act applies only to employes engaged in the transportation of passengers or property and by no means so broad as the Employer's Liability Act. No contention was made by the government that the employe was, because of the character of his work, within the act, but it was contended that he came within the act solely because he had been prior to that time an engineer engaged in interstate commerce and was "potentially" subject to recall. The case would not have been cited had not the court used the words "not repairing" in parenthesis in the following portion of the opinion:

"Now when analyzed, the stipulation means nothing more, as I understand it, that at one time Crown was regularly employed by the de-

fendant in moving interstate commerce; that thereafter for a period of 59 days he was regularly employed in operating a work train, wholly within the state of Idaho, for the purpose of filling (not repairing) a bridge upon a line of road which was a part of an interstate highway; that thereafter he again went back into interstate commerce service."

The decision is certainly not in point.

The Illinois case cited, *Dickinson v. Industrial Board of Illinois,* 280 Ill. 342, was one where a carpenter, employed by a railroad engaged in both interstate and intrastate commerce, employed in building forms on the margin of a right-of-way into which concrete was to be poured to form retaining walls for the elevation of the tracks, was injured by sawdust flying in his eye. It was held he was not engaged in interstate commerce. He was employed on a structure which had not yet become an instrumentality of interstate commerce. The state supreme court held that his work was a matter of indifference so far as the interstate commerce in which the railroads were engaged was concerned, although the structure to be erected might eventually become an instrumentality of such commerce.

In the case at bar, the petitioner's employment was not a matter of indifference to interstate commerce. In the first place, the structure upon which

he was working and which he was filling had already long been used in interstate commerce. In the second place, the work was being performed for the purpose of replacing that structure when it was approaching the end of its usefulness and improving the interstate roadway at that place. In the third place, his work in keeping the track clear of material which was dumped upon it was not a matter of indifference to the interstate commerce of the railroad company. His failure to perform that duty or his negligent performance thereof might easily have resulted in the derailment of an interstate train and the interference with interstate traffic. As the superintendent of the railroad said, that work was performed because it was necessary to keep the track clear and prevent accidents and derailments.

The Supreme Court of Idaho concedes and refers to the fact that it was one of the duties of the petitioner to remove dirt and rocks from the track which lodged thereon when the cars were dumped and which might, if allowed to accumulate, interfere with interstate commerce. They dispose, however, of this by holding that it was but an incident to the work of constructing and filling and did not change the character of the employment.

It was just as essential that he should spread the dirt on the outside of the rails away therefrom with the dozer as he would with the shovels clear the tracks between the rails. In both cases, he was keeping the track clear for the passage of trains. The act of keeping that trestle and that railroad track clear was performing an act for the purpose of furthering interstate commerce.

II.

THE REPLACEMENT OF INSTRUMENTALITIES ALREADY EMPLOYED IN INTERSTATE COMMERCE IS AN ACT IN THE FURTHERANCE OF INTERSTATE COMMERCE.

The work of replacing an old girder with a new one in a bridge used by interstate trains and the work incident thereto in carrying the material to the point of use is an employment in interstate commerce.

Pedersen v. D. L. & W. R. Co., 229 U. S. 146

The replacing of old rails with new ones brings the employe engaged in such work within the Federal Employers' Liability Act.

Philadelphia B. & W. R. Co. v. McConnell, 228 Fed. 263 (C. C. A. 3rd Circuit)

In the above case, the employe was assistant foreman of a gang on a work train. A few days before the injury, the work train had taken new rails to a place where a track was to be repaired. The old rails were moved and new ones installed. On the day plaintiff was injured, the said train and gang were engaged in removing the old rails from where they had been left between the tracks, While plaintiff was on a car in the performance of his duties, members of the gang under the supervision of the foreman threw a rail on the car in such a manner that one end projected beyond the side of the car, was struck by a passing train, thrust against the plaintiff and injured him. The Circuit Court of Appeals used the following language, which is very apt in this case:

> "The work of the train on which the plaintiff was employed had nothing to do with the immediate or direct movement of interstate commerce. Being a repair train, its direct relation was to instrumentalities of commerce rather than to the movement of commerce. With respect to its movement on the day of accident, its journey was defined and was wholly within the State of Pennsylvania. * * * *
>
> Here the work was not being done independently of the interstate commerce in which the defendant was engaged, nor was the performance of the work a matter of indifference

so far as that commerce was concerned. The removal of old rails from between the tracks on the roadbed of a railroad over which moves heavy traffic, both interstate and intrastate, constitutes keeping the tracks and roadbed in suitable condition for interstate commerce, and is as necessary for the proper maintenance of the tracks and roadbed as renewing the tracks. The work of which the plaintiff's was a part, was the repair of the roadbed by replacing old rails with new ones. This included removing old rails and installing new ones. The work of removing old rails was not complete when they were lifted from their place upon the ties and tossed upon the roadbed, but was complete only when they were carried away from the place where they lay between the tracks."

If the substitution of a heavy rail for a light one, of a new rail for an old one, brings an employee engaged in that work within the terms of the act, and if the work preliminary to the actual laying of the rails and the taking and carrying them away is such as brings him within the act, then why is not the replacement of a wooden bridge by a new bridge or a dirt fill of such character that an employe engaged therein is within the terms of the act, and especially in a case like this where there is no change of route, where the bridge or trestle is used continuously in interstate commerce and the replacement is continued and carried on during such act?

It has been held that an employe engaged in substituting a new bridge for an old one is within the terms of the act.

Cincinnati N. O. & T. P. R. Co. v. Hall, 243 Fed. 76.

We respectfully urge that the decision of the Supreme Court of Idaho in this case is contrary to the rules which have been announced by this court and is a misinterpretation of the Federal Employers' Liability Act.

III.

A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OF CONFLICT OF DECISIONS BETWEEN THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE DECISION OF THE SUPREME COURT OF IDAHO IN THIS CASE.

There is a conflict of decision between the Circuit Court of Appeals for the Sixth Circuit in

Cincinnati N. O. & T. P. R. Co. v. Hall, 243 Fed. 76

and the decision of the Supreme Court of Idaho in this case. The case in the Circuit Court of Appeals

for the Sixth Circuit seems to be directly in point and directly in conflict with the Idaho decision. The facts there were substantially as follows:

Preparatory to the substitution of a new bridge for an old one over Sody creek in Tennessee, on the main line of the defendant's road, the defendant caused a cut to be made in the fill approaching the bridge and immediately next to a stone abutment at the south end of the bridge. The cut was to make a place for a wooden bent, which with another on the north side of the abutment, was to hold up the track and bridge while the abutment was removed and other permanent structure built in its place.

Hood, an employe, was with others engaged on the cut. As the work proceeded, the face of the fill was shored up, planks being placed upright against the face of the cut braced by crosspieces running from the face of the planks to the face of the abutment.

To the end that traffic might not be interrupted, strong stringers were placed under the ties to hold up the tracks, the ends on one side resting on the abutment and on the other on the roadbed itself, or upon a heavy cross sill. The fill was composed of

sand and some clay mingled with rocks and boulders. Trains passed over from time to time.

Hood was working under the tracks when the fill caved in, and was fatally hurt. In the course of the opinion, the court says, citing

Pedersen v. D. & L. W. R. Co., 229 U. S. 146

> "The interstate character of Hood's service is by the agreement admitted; but, since such admission of matter of law may not be conclusive of the court's duty to inquire into its jurisdiction, it may be said the facts bring the case within the act without any doubt."

No distinction can be drawn between the work in which Hood was employed and the work in which petitioner was employed in this case. In each case the object of the work was to replace a bridge. In both cases the employe was engaged in work designed to prevent the interruption of traffic during the replacement of the bridges.

We also urge that there is a conflict of decision between the Circuit Court of Appeals for the Fourth Circuit in

Southern Ry. Co. v. M'Guin, 240 Fed. 649

and the decision of the Supreme Court of Idaho in this case. In the case in the 240 Fed, the Circuit Court of Appeals for the Fourth Circuit held that

a sectionman engaged in assisting a railroad surveyor in a survey made to improve a curve in a track used in interstate commerce is employed in interstate commerce within the meaning of the Federal Employers' Liability Act. A few minutes before the deceased was killed, the surveyor had sent him to a designated point to hold a rod by means of which he intended to take a back sight. He was struck by a train and killed. The surveyor completed the work by placing the stakes, but the change in the track was never made. The defendant was a carrier of both interstate and intrastate commerce. The court said:

> "The case of *Pedersen v. Delaware, etc. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 154, seems conclusive on the first point. It was there held that the work of keeping in repair the track, roadbed and other instrumentalities of a railroad engaged in interstate commerce is so closely related to interstate commerce as to be in practice and in legal contemplation a part of it. The work held to be a part of interstate commerce was the carrying of bolts or rivets to be used in taking out an old girder of a bridge and putting in a new one. Here the work was surveying and marking the changes to be made in the position of the crossties and rails, so as to make a better curve. No distinction can be founded on the failure of the railroad to complete the work by actually making the changes contemplated. Making the survey was as much a part of the work as laying the

rails according to the survey. *The numerous cases in which the work was on things which had not at the time become instrumentalities of interstate commerce obviously have no application.*" (Italics are ours)

A writ of *certiorari* was denied in this case, 244 U. S. 654.

Petitioner respectfully, therefore, submits that a writ of *certiorari* ought to issue,

First, in the interest of jurisprudence and uniformity and harmony of decision between this court and the Supreme Court of Idaho in respect of the questions above indicated;

Second, because, as has been decided by this court in

Forsyth v. Hammond, 166 U. S. 506

this court will grant a writ of *certiorari* in a case where there is an important conflict of opinion between a state supreme court and a Circuit Court of Appeals.

Third, because the replacement of trestles and bridges without interruption of traffic and the performance of the work in such manner as not to imperil interstate commerce is a duty which railroads are required to meet every day. Whether employes

engaged in such work are within the Federal Employers' Liability Act is a question which will continually arise, and this court should place the stamp of finality upon the status of such employment.

Fourth, because the determination of this question is not important alone to the petitioner, but it is important because there should be a uniformity in the interpretation and the construction of the act under circumstances which will constantly be recurring.

Respectfully submitted,

JOHN P. GRAY,
Coeur d'Alene, Idaho.
Attorney for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM KINZELL, *Petitioner,*

v.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, COMPANY, a corporation,

Respondent.

NOTICE.

TO ROBERT H. ELDER, ESQ.,

Counsel for Respondent.

Sir:

Please take notice that on Monday, the_____ day of_____, 1918, upon the opening of the court, or as soon thereafter as counsel can be heard, the foregoing petition and brief, together with a certified copy of the entire transcript of the record in the case, will be presented and submitted to the Supreme Court of the United States, in its courtroom in the Capitol, at Washington, D. C., in pursuance of its rules, in such cases made and provided.

Dated this_____day of May, 1918.

JOHN P. GRAY,

Of Counsel for Petitioner.